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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 727

ARTHUR G. VESCELIUS, TRUSTEE IN BANKRUPTCY OF RIVER EDGE ESTATES, INC.,

Petitioner,

vs.

ABRAHAM A. WEDEEN, ASSIGNEE FOR THE BENEFIT OF CREDITORS OF JAMAICA CONCRETE CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

WILLIAM N. GURTMAN,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 727

ARTHUR G. VESCELIUS, Trustee in Bankruptcy of River Edge Estates, Inc.,

Petitioner,

vs.

ABRAHAM A. WEDEEN, Assignee for the Benefit of Creditors of Jamaica Concrete Corporation.

PETITION FOR WRIT OF CERTIORARI.

May It Please the Court:

The petition of Arthur G. Vescelius respectfully shows to this Honorable Court:

A.

Summary Statement of Matters Involved.

Your petitioner is the trustee in bankruptcy of River Edge Estates, Inc., a New Jersey corporation, appointed by the District Court of New Jersey. This petition is filed for the purpose of procuring an adjudication of petitioner's right, as such trustee, to a certain fund deposited by or in behalf of the said River Edge Estates, Inc. with the Clerk

of the New Jersey Chancery Court in connection with certain proceedings instituted in said court prior to the bankruptcy by the predecessor in interest of respondent. Petitioner contends that by virtue of legal technicalities based upon the alleged effect of a decree made in said Court of Chancery after the filing of the bankruptcy proceedings your petitioner has been deprived of the right to adjudicate his interest in said fund. Furthermore, the District Court and the Circuit Court of Appeals refused to grant to your petitioner appropriate interim relief pursuant to the rules of said courts thereby preventing the proper and orderly distribution of the bankrupt estate in accordance with the provisions of the Bankrutpcy Act.

The bankrupt was organized in 1939 and engaged in the real estate development business in Bergen County, New Jersey. In June, 1940, Charles Masholie, a stockholder of Jamaica filed a suit in the New Jersey Court of Chancery to impress a trust on all the properties of River Edge and for other relief including the recovery of moneys for materials furnished and services rendered. The suit was predicated upon the improper withdrawal of the funds of Jamaica by one, Daniel Salvator, who had managed and directed the affairs of Jamaica and who had apparently used such funds in acquiring the lands on which River Edge conducted its development operations. Concurrently with the filing of this suit a Lis Pendens was filed in the Bergen County Clerk's Office. At the time of the filing of this suit, River Edge had converted the acreage purchased as aforesaid into building lots by cutting streets, laying sidewalks, sewers and other utilities; it had built a large number of dwellings, some of which were completed and sold, some were under contract, and others were in various stages of construction; it had incurred large obligations for materials and services and was heavily indebted to a bank mortagagee. The business of the bankrupt

was under the direction and control of the aforesaid Salvator.

On June 17, 1940, an order was advised in said Chancery proceedings by Vice Chancellor Charles M. Egan, one of the Vice Chancellors of said Court, directing the deposit "by or in behalf of" River Edge of the sum of $12,500.00 with the Clerk of the Court of Chancery to be held subject to the further order of said Court and directing the discharge of the Lis Pendens aforementioned. The said sum was deposited and the Lis Pendens discharged.

On February 11, 1941, a final hearing in the aforesaid proceedings was held before Vice Chancellor Egan. At this hearing application was made in behalf of Jacob Visel, who had theretofore been appointed custodial receiver of Jamaica by the New York Supreme Court, to intervene in the cause, which application was granted. No notice of these proceedings was given to the general creditors of River Edge and they were not present or otherwise represented at the hearing and their interest in the affairs of River Edge was in no way considered or adjudicated. River Edge, as defendant in said Chancery proceedings, offered no testimony and presented no witnesses to indicate to the court the status of its properties and the interest of its creditors.

On March 20, 1941, while the aforementioned suit was pending for determination by Vice Chancellor Egan, and without any knowledge of said proceedings, a creditors' bill was filed against River Edge, in said Chancery Court, with Vice Chancellor Vivian M. Lewis, another Vice Chancellor of said Court, alleging the insolvency of River Edge and requesting the appointment of receivers. An order was advised by Vice Chancellor Lewis granting the application and appointing custodial receivers.

On March 31, 1941, Vice Chancellor Lewis made an order adjudging River Edge insolvent and appointing statu-

tory receivers. On the same day Vice Chancellor Egan filed his opinion, finding in favor of Jamaica in the suit pending before him.

On April 1, 1941, the statutory receivers aforementioned, by authority of Vice Chancellor Lewis, applied to Vice Chancellor Egan for leave to intervene in the pending proceedings. Such application was predicated on the allegation that the claims of the creditors of River Edge should be properly adjudicated in the pending suit before a decree was entered. This application was strenuously opposed by counsel for Jamaica.

On April 25, 1941, an involuntary petition in bankruptcy was filed against River Edge in the District Court of New Jersey, by creditors other than the creditors who had filed the insolvency proceedings in Chancery. The matter was referred to Referee John Grimshaw, Jr. On April 30, 1941, the Referee appointed receivers in bankruptcy and issued general restraints against interference with the properties and affairs of River Edge (R. 5-7). Due notice of this order was given to all interested parties.

On May 6, 1941, Vice Chancellor Egan filed his opinion denying the application of the Chancery receivers to intervene in the trust suit. In view of the filing of the bankruptcy proceedings and the order of April 30 aforementioned, the Chancery receivers (who were the same persons who were appointed bankruptcy receivers) had no further authority in the premises except such authority and direction as they would thereafter receive from the Bankruptcy Court.

On May 8, 1941, on the application of counsel for Jamaica, Vice Chancellor Egan advised a decree granting the relief prayed for by Jamaica, impressing a trust on all the properties of River Edge, directing a reference to a Master in Chancery to state the account due from River Edge to Jamaica, directing the payment of counsel fees

and other allowances out of the funds on deposit and ordering the payment of the balance of said deposit to Jamaica. No reference was made in said decree to the existing bankruptcy proceedings or to the interest of your petitioner or of the other creditors of River Edge.

On May 21, 1941, an adjudication of bankruptcy was entered. On May 28, 1941, Jamaica by David H. Harris, attorney, filed a petition in the Bankruptcy Court praying that the receivers in bankruptcy be directed to turn over to Jamaica all of the property of the bankrupt in accordance with the provisions of the Chancery decree of May 8 aforementioned. The estate of the bankrupt on that date consisted of the $12,500.00 on deposit with the Chancery Clerk and approximately $1500.00 in the possession of the bankruptcy receivers, which latter sum was realized by a sale to a subsidiary of the bank mortgagee of the right, title and interest of the bankrupt in its real estate holdings. By the filing of this petition, Jamaica availed itself of and consented to the jurisdiction of the Bankruptcy Court to determine its rights in the bankrupt estate.

On June 4, 1941, the bankruptcy receivers filed an answering and cross petition to the petition of Jamaica, asserting their superior right to the possession of the fund on deposit with the Clerk in Chancery.

On June 25, 1941, the first meeting of creditors of the bankrupt was held and your petitioner was elected and qualified as trustee. Thereafter, on July 31, 1941, petitioner filed a further petition in the Bankruptcy Court asserting his right to possession of the fund on deposit with the Chancery Clerk. An order was thereupon made directing all persons in interest to show cause why the relief prayed for by petitioner should not be granted.

On August 13, 1941, Jacob Visel, the custodial receiver who had intervened in the original Chancery suit, filed an affidavit in the bankruptcy proceedings charging that David

H. Harris had no authority from Jamaica to file the reclamation petition on May 28 aforementioned and challenging the authority of the Referee to act in the premises. This step was taken in the face of the fact that Visel previously (on June 25, 1941) voluntarily appeared before the Referee on another phase of the matter, had entered his appearance, and had participated in the proceedings at a time when Harris was also present as attorney for Jamaica. On September 4, 1941, Harris filed a statement with the Referee asserting his lack of authority to appear for Jamaica and praying leave to withdraw the petition of May 28.

On September 18, 1941, Abraham A. Wedeen filed an affidavit in the Bankruptcy Court setting forth that on July 30, 1941, an assignment for the benefit of creditors had been executed by Jamaica to him and that he had duly qualified as such assignee by an order made in the Supreme Court of New York. Accompanying the affidavit was a notice of special appearance challenging the jurisdiction of the Referee to act in the premises. The aforesaid assignment for the benefit of creditors was executed by the same Daniel Salvator (and his wife as the officers of Jamaica) who had been responsible for the affairs of both Jamaica and bankrupt, and without notice to petitioner.

Whether intended or not, the effect of the aforesaid action by Visel, Harris and Wedeen, would be to evade the voluntary acceptance by Jamaica of the jurisdiction of the Bankruptcy Court by the filing of the petition of May 28. At the same time it would tend to prevent your petitioner from asserting any right to the Chancery fund in the State court because, relying on the good faith of the action taken by Jamaica in filing the petition in reclamation, the time for filing an appeal from the Chancery decree had been permitted to expire. By strange coincidence, neither Visel, nor Harris, nor Wedeen, brought the matter

of lack of authority or lack of jurisdiction to the attention of the Bankruptcy Court until after the time for appeal had expired. The best answer to the good faith of these proceedings is the conclusion of the Referee concerning the matter (R. 14).

> "It is unconceivable that it took Mr. Harris from May 28th to August 27th to discover that he was without authority to represent Jamaica Concrete Corporation. And it is difficult to reconcile Mr. Visel's affidavit with the facts. On August 27th he swore that he had just learned of the filing of the reclamation petition and the appearance of Mr. Harris as attorney for Jamaica Concret Corporation. Yet as early as June 25th Mr. Visel was present in court when the reclamation proceeding was discussed and Mr. Harris appeared as counsel for Jamaica Concrete Corporation.
>
> "I am unable to place any reliance upon either the statement or the affidavit. Whether their inaccuracies are due to indifference or design is not a question requiring determination at this time. The result would be the same in any event. I cannot escape the conclusion that the attempt to withdraw the reclamation petition was actuated by fear of the legal consequences resulting from the filing of the petition.
>
> "The application of Mr. Harris for leave to withdraw the reclamation petition will be denied. The special appearance of Mr. Visel will be dismissed."

On December 1, 1941, petitioner filed a petition alleging that Wedeen had announced his intention of seeking a distribution of the deposit fund and asking a restraint against such action pending a determination of the proceedings. On December 20, 1941, after notice to interested parties, an order was made restraining respondent, his attorneys and agents, from doing anything or issuing any process toward the procurement of a distribution of the deposit fund (R. 7-8). This order contained a specific provision declaring that the order of restraint originally

made on April 30, 1941, was to remain in full force and effect.

On March 6, 1942, Referee Grimshaw filed his memorandum determining the pending issues (R. 9-16) wherein he denied the application of Harris to withdraw the reclamation petition, dismissed the special appearance of Visel, affirmed the jurisdiction of the Bankruptcy Court in the premises, and directed that the trustee in bankruptcy apply to the Chancery Court for leave to intervene in the said proceedings, and reserved decision with respect to the application for the turn over of the fund on deposit in Chancery. On March 23, 1942, the Referee made an order pursuant to his said opinion (R. 17-18). Pursuant to the direction of the Referee as aforesaid petitioner applied to Vice Chancellor Egan and procured an order permitting him to intervene in the Chancery suit. Thereafter, respondent filed applications for the review of the orders of the Referee. Considering that the matters should be finally adjudicated, including the question of the propriety of the reference to the Court of Chancery, petitioner advised the Vice Chancellor of the filing of the petitions of review by respondent and obtained an order vacating the order of intervention to enable petitioner to file an application for review to the District Court, so that the entire matter might be adjudicated at one time. Thereafter petitioner applied to the District Court Judge for leave to file an application for review as of time, so that the entire matter might be before the court. This application was denied on the ground of failure to apply within time, although the other phases of the matter were before the court for review on the application of the respondent and had not yet been heard.

On April 1, 1943, the District Court Judge filed his opinion on the matters under review (R. 19-22), denying the jurisdiction of the Bankruptcy Court in the premises,

granting the right of Harris to withdraw his petition of reclamation and granting the right of Visel to a special appearance, and on April 2, 1943, orders were made, pursuant to said opinion reversing the orders of the Referee (R. 22-24).

Petitioner appealed to the Circuit Court of Appeals. In preparing the record for such appeal counsel for petitioner learned that in transmitting his certificate and papers in the cause to the District Court pursuant to Section 39A (8) of the Bankruptcy Act in connection with Jamaica's application for review, the Referee had failed, through inadvertance, to send up the transcript of the testimony of June 25, 1941, had before him, at which hearing both Visel and Harris were present and upon which hearing the Referee relied in denying Harris' application to withdraw Jamaica's petition and Wedeen's special appearance. Assuming the need of reference to this transcript for a complete record on appeal to the Circuit Court of Appeals, counsel for petitioner filed a reference thereto, within time, as a supplement to his designation of record on appeal designated therein as item 23. Respondent thereupon applied to the District Court for an order to exclude said item from the record on appeal, and over the objection of petitioner an order excluding the item was made (R. 47). Thereafter petitioner applied to the Circuit Court of Appeals for leave to supplement and correct the record on appeal by the inclusion of the item referred to, relying upon the right to interim relief pursuant to Rule 32 (3) of said Court and Rule 75 (h) of the Federal Rules of Civil Procedure. Such application was denied (R. 50).

While preparing the record for appeal to the said Circuit Court of Appeals, counsel for petitioner learned that respondent had procured a distribution of the $12,500.00 deposit fund except for a balance of $200.00. Such distribution was made on April 5, 1943, pursuant to demand of

counsel for respondent made by letter dated April 2, 1943, being the same day on which the orders of reversal were made by the District Court Judge. No notice of such demand for withdrawal was given to petitioner and neither of the orders of reversal of the District Court Judge directed such withdrawal. Considering that such withdrawal deprived petitioner of right to relief under Rule 62 of the Rules of Civil Procedure, and was in violation of the order of April 30, 1941, and was not authorized by the orders of reversal of April 2, 1943, petitioner applied to the District Court for an order directing the reinstatement of the fund pending decision on the appeal by the Circuit Court of Appeals. Such application was denied (R. 48-49). Thereupon application was made to the Circuit Court of Appeals for an order to the same effect. The application was denied (R. 50).

On December 13, 1943, the Circuit Court of Appeals affirmed the orders of the District Court for the reasons stated by that Court, and on the same day entered an order of affirmance of the District Court (R. 57-58).

As a result of the aforesaid decision denying the jurisdiction of the Court of Bankruptcy in the premises, the right to an orderly and equitable marshalling and distribution of the bankrupt estate is entirely destroyed. The decree in Chancery purports to control all of the property of the bankrupt, yet respondent denies the jurisdiction of the Court of Bankruptcy, leaving undisposed and undetermined the moneys of the bankrupt now in possession of the trustee. The trustee has been denied any right in the deposit fund withdrawn by respondent although neither petitioner nor the creditors of bankrupt ever had their day in any court for a determination of such right, thereby constituting a deprivation of property without due process of law. Whereas it would ordinarily be the right and duty

of petitioner to follow and attempt to recover from Salvator and others moneys improperly withdrawn from bankrupt, the assertion of such right would be futile since the avails to be realized thereby would be the property of respondent under the Chancery decree. The effect of the decision is that no court has complete jurisdiction to carry out an orderly liquidation of the bankrupt estate in direct contravention of the purpose and intent of the Bankruptcy Act.

B.

Jurisdictional Statement.

Petitioner shows that this Court has jurisdiction to review the judgment of the Circuit Court of Appeals by virtue of Bankruptcy Act, Section 24c, as amended June 22, 1938, 52 Stat. 854 (11 U. S. C. A., Section 47c) which provides:

> "The Supreme Court of the United States is hereby vested with jurisdiction to review judgments, decrees, and orders of the Circuit Courts of Appeals of the United States and the United States Circuit Court of Appeals for the District of Columbia in proceedings under this title in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted".

This Court has jurisdiction to review the judgment complained of by certiorari. Judicial Code, Section 240 (28 U. S. C. A., Sec. 347), provides that in any case in a circuit court of appeals it shall be competent for this Court, upon the petition of any party thereto, to require by certiorari that the cause be certified to this Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought up by unrestricted writ of error or appeal.

C.

The Questions Presented.

Did the Court of Bankruptcy have exclusive non-delegable jurisdiction to determine the right of all interested parties in the fund deposited in the Court of Chancery?

Did the Referee have the power and authority to restrain interference with or distribution of the deposit fund pending a determination of the interest of all persons therein?

Was the Court of Bankruptcy bound by the decree made in the Court of Chancery?

Did the Circuit Court of Appeals err in refusing petitioner's application to correct and supplement the record on appeal?

Did the Circuit Court of Appeals err in refusing petitioner's application to correct and supplement the record on appeal?

Did the Circuit Court of Appeals err in refusing petitioner's application to reinstate the deposit fund pending determination of appeal?

D.

Reasons Relied on for Allowance of Writ.

Petitioner relies on the following reasons for the allowance of the writ of certiorari.

1. The decision of the Circuit Court of Appeals is in conflict with applicable decisions of this Court. The Circuit Court of Appeals held in effect that, because the Chancery proceedings in which the deposit was made were instituted and hearing was had therein prior to the filing of the bankruptcy proceedings, the Court of Bankruptcy was thereby deprived of all jurisdiction in the matter notwith-

standing that the interest of the creditors of the bankrupt were in no wise considered or adjudicated in such suit. This Court has repeatedly held that the jurisdiction of the Court of Bankruptcy is exclusive and non-delegable and is not limited or reduced by the existence of a lien or judgment in a prior State court proceedings where the circumstances require the interposition of the wide equity powers of the Court.

Taylor v. *Sternberg,* 293 U. S. 470;
Pepper v. *Litton,* 308 U. S. 295.

Furthermore the Court of Bankruptcy upon the filing of the bankruptcy petition on April 25, 1941, became vested with the right to the possession of all of the assets of the bankrupt, not only those actually in its possession, but also those constructively in its possession, such as the fund deposited in Chancery, which was deposited "by or in behalf of" the bankrupt.

Thompson v. *Magnolia Petroleum Co.,* 309 U. S. 478;
Whitney v. *Neuman,* 198 U. S. 539.

The Court of Bankruptcy has permitted the retention of jurisdiction by a State court over property of a bankrupt, in connection with proceedings pending in a State court but only in such cases where a specific judgment or lien on specific property had been fixed and determined prior to the intervention of bankruptcy which lien or judgment under principles of comity the Court of Bankruptcy found it unnecessary to disturb.

Metcalf v. *Barker,* 187 U. S. 165;
Pickens v. *Roy,* 187 U. S. 177;
Straton v. *New,* 283 U. S. 318;
Piedmont Coal v. *Hustead,* 294 F. 247;
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Union Joint Land Stock Bank v. *Byers*, 100 F. (2nd) 82;

Daniel v. *Wilson-Wessner-Wilkenson Co.*, 109 F. (2nd) 364.

2. The Referee had the power to restrain any interference with the properties and assets of the bankrupt pending a determination of all interests therein. One of the reasons assigned in the order of April 2, 1943, reversing the Referee's order of December 20, 1941, was "that the Court of Bankruptcy is without authority to prohibit the enforcement of said decree." It is to be noted that the restraints contained in the order of December 20, 1941, applied only to respondent, his attorneys and agents. This was clearly within the power of the Referee under Section 2 (15) of the Bankruptcy Act. This is borne out by the statement of the Judiciary Committee of the House of Representatives made in connection with the repeal of Section 3 of Rule 12 of the General Orders in Bankruptcy. I quote from page 19 of the report of the House Committee on the Judiciary of January 29, 1937;

> "The proviso added is an adoption of part of the former General Order XII which provides that applications for an injunction to stay proceedings of a court or officer of the United States or of a State shall be decided by the Judge. Some courts have confused this section with Sec. 11a and have taken the view that the issuance of injunctions is governed by the latter section, whereas the framers of the Act intended Sec. 2a (15) to be for the use of receivers and trustees in protecting and preserving the estate, and Sec. 11 for the use of the bankrupt in securing his discharge. There has also been some question about the power of Referees to issue injunctions. The weight of authority allows Referees to enjoin the parties to a suit although they were prohibited by the former General

Order XII, clause 3, from enjoining the court itself, this power being reserved to the judge. As a matter of actual practice, of course, injunctions are not issued to restrain the court, but to restrain the litigants. These matters should be cleared up."

3. The Court of Bankruptcy was not bound by the Chancery decree of May 8, 1941. The petition in bankruptcy was filed on April 25, 1941. It constituted a caveat to all the world of the vesting of the jurisdiction of the Court of Bankruptcy over the bankrupt and all its properties. Such decree was void by virtue of Section 67 A (1) of the Bankruptcy Act. The filing of the Lis Pendens constituted notice and was not a lien. Its effect was limited to June 17, 1940, when it was discharged.

Allen v. *Morris,* 34 N. J. L. 159.

This Court has recognized the distinction between a lien and the right to a lien.

Metcalf v. *Barker,* 187 U. S. 165.

The rights of the creditor's of the bankrupt in the deposit fund was superior to the right of respondent.

Frelinghuysen v. *Nugent,* 36 F. 229;

In re Harrigan Supply Co., 2 F. (2nd) 791;

In re Toms River Trust Co. of Toms River, 192 A 47.

The decision of the Circuit Court of Appeals deprives them of that right without due process of law.

4. The Referee was required by Section 39 A (3) of the Bankruptcy Act to transmit promptly to the Clerk of the Court the transcript of the evidence taken before him on June 25. This he inadvertently neglected to do. The petitioner was in no way responsible for this omission. The transcript was necessary for a proper record on appeal

because it constituted the basis of the Referee's denial of the Harris application to withdraw the reclamation petition and the Wedeen application for a special appearance. The power and authority to correct and supplement the record as indicated is clearly available under Rule 75 H of the Federal Rules of Civil Procedure, and the denial of the petitioner's application constituted a deprivation of his rights in the cause.

5. Rule 32 (3) of the Rules of the Circuit Court of Appeals for the Third Circuit provides as follows:

> "Interlocutory Relief—Application for—Contents. Where, pending appeal, application is made to the court, or a circuit judge, for any relief which might have been granted by the trial judge, such application must show either that it is not practicable to apply to the trial judge for the relief or that application has been made to him and denied, with the reasons given by him for the denial. With the application shall be filed copies of such parts of the record in the court below as are available; and timely notice of the application shall be given the opposite party or his counsel."

When counsel for respondent made demand of the Clerk of the Court of Chancery for a distribution of the deposit fund on the same day that the District Court's orders of reversal of the Referee's orders were made, he, in effect, deprived petitioner of the right to procure a stay of the proceedings pending appeal in accordance with Rule 62 of the Federal Rules of Civil Procedure. He was also acting in contravention of the original order of restraint of April 30, 1941. It was vitally necessary in the ultimate interest of all parties concerned that the deposit fund be maintained intact pending the determination of the appeal. Under the circumstances petitioner was clearly entitled to

an order directing the reinstatement of the fund, and such relief properly given under the rule aforementioned and under the general equity powers of the court to control the property of a bankrupt pending the adjudication of litigated questions.

WILLIAM N. GURTMAN,
Counsel for Petitioner.

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ARTHUR G. VESCELIUS, Trustee in Bankruptcy of River Edge Estates, Inc.,

Petitioner,

vs.

ABRAHAM A. WEDEEN, Assignee for the Benefit of Creditors of Jamaica Concrete Corporation,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

Leo Guzik,
Joel Gross,
Of Counsel for Respondent.

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The decisions of the Supreme Court of the United States, as well as those of the lower Federal courts are uniform in holding that the jurisdiction of a court over a suit *in rem* affecting specific property, where the court has acquired possession of the property involved more than four months prior to the bankruptcy of the defendant, is not superseded by such bankruptcy proceeding and that the Bankruptcy Court lacks the power to wrest possession of the property and jurisdiction of the suit from the court first assuming jurisdiction	7
We respectfully submit that there is no conflict of decision to be resolved herein, and that the applicable decisions uniformly support the determination of the District Court and the Circuit Court of Appeals below. The matter is one turning upon the facts of the particular case and raises no questions of public interest. There is, in the language of Chief Justice Hughes, "an utter absence of any good reason for asking" for a *Writ of Certiorari.* The petition, therefore, should be denied, with costs	11

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ARTHUR G. VESCELIUS, Trustee in Bankruptcy of River Edge Estates, Inc.,

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Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

It is apparent from the Petition for *Writ of Certiorari* that the petitioner has entirely misconceived the purpose of the Writ. The petitioner seeks to have this Court review not only the questions of law involved in this cause, but also (1) the findings of fact in favor of the respondent by both the District Court and the Circuit Court of Appeals; (2) the denial by the Circuit Court of Appeals of the petitioner's application to "correct" the record before said Court; (3) the denial by the District Court and the Circuit Court of Appeals of his application for interlocutory relief pending the determination of his appeal to the Circuit Court of Appeals. The petitioner's argument on these issues is susceptible of much correction and reply in point of fact and law. It is, however, so well established that *Certiorari* will not be granted to review

matters of this character pertaining to questions of fact, the state of the record, and the propriety of *ad interim* relief, that it would serve no purpose for us to treat such issues herein.

> "Applications of decisions to peculiar and debatable sets of fact; insistence that the facts are otherwise than the lower courts found them to be—these are the recurrent characteristics of unsuccessful petitions."
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> *Supreme Court at October Term, 1933*, by Felix Frankfurter and Henry M. Hart, Jr., 48 Harv. L. R. 238, 273;
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> *Layne & Bowler Corporation* v. *Western Well Works, Inc.*, 261 U. S. 387 (1923);
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> *Magnum Import Co.* v. *Coty*, 262 U. S. 159, 163 (1923);
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> *Southern Power Co.* v. *Public Service Co.*, 263 U. S. 509 (1923).

We will take issue with the petitioner on his assertion that the decision of the Circuit Court of Appeals is in conflict with the applicable decisions of this Court. This contention is the sole reason assigned by the petitioner for the granting of the Writ which falls within "the character of reasons which will be considered" (Supreme Court Rule No. 38 (5)) in support of a petition for a *Writ of Certiorari.*

The Facts

We deem it necessary to state the facts because the petitioner's "Summary Statement of Matters Involved" sets forth, argumentatively, matters that are not grounded in the Record. (To illustrate: the last 9 lines on page 2). *Furness, Withy & Co.* v. *Yang Tsze Ins. Assn.*, 242 U. S. 430 (1916).

In June of 1940, more than ten months prior to the commencement of this bankruptcy proceeding, a bill of complaint was filed in the Court of Chancery of New Jersey seeking to enforce a constructive trust in certain specific real property purchased in the name of the defendant named in said suit, River Edge Estates, Inc., with funds of the complainant, Jamaica Concrete Corporation. (Bill of Complaint, R. p. 27). Concurrently with the filing of the bill of complaint a *lis pendens* was filed in the Office of the County Clerk of Bergen County giving notice of the claim made by Jamaica Concrete Corporation to the said real property. The property was described by metes and bounds in both the bill of complaint and the *lis pendens* (R. p. 36).

The New Jersey Lis Pendens Act (R. p. 40) provides for the discharge of real estate from the claim made against it upon the deposit of sufficient security.

On June 17th, 1940, pursuant to said statute, an order was made in the said chancery proceeding, reciting that the defendant offered to pay into the said court the sum of $12,500.00 and that "the security given by the defendant by the payment into court of the monies aforesaid was sufficient security to pay such sum of money as may, by the final determination of the cause, be ascertained to be chargeable upon the affected real property", and directing that said real estate be discharged from the claim of the complainant (Amended Order of June 17th, 1940, R. p. 37).

On February 11th, 1941 all parties having duly filed pleadings by their respective solicitors bringing the matter to issue, the cause came on for final hearing before the Honorable Charles M. Egan, Vice Chancellor of the Court of Chancery of New Jersey. The defendant, River Edge Estates, Inc., through its counsel, William J. Morrison, Jr., of the firm of Morrison, Lloyd and Morrison, contested the relief sought by the complainant.

On March 31st, 1941, Vice Chancellor Egan filed his opinion in which he concluded that the monies of the complainant had been traced to the property of the defendant and that the real property of the defendant, and therefore the fund deposited in its place, were held in trust by River Edge Estates, Inc., a defendant in said suit named, for the benefit of the complainant, and that said property and fund should be impressed with a constructive trust and equitable lien; and on May 8th, 1941, Vice Chancellor Egan entered a formal decree in accordance with his said opinion. An appeal lies from a decree of the Court of Chancery to the Court of Errors and Appeals of New Jersey (*N. J. R. S.* 2:29-117). No appeal was perfected therefrom and the decree became a final adjudication, unless the same can be collaterally reviewed, as the petitioner is attempting to have it reviewed.

On April 24th, 1941, after the opinion had been filed in the Court of Chancery, but before the entry of the formal decree, an involuntary petition in bankruptcy was filed against River Edge Estates, Inc. (R. p. 2). The said corporation was adjudicated bankrupt on May 21st, 1941 (R. p. 2). On July 31st, 1941, the trustee in bankruptcy, the petitioner herein, filed with the Referee in Bankruptcy a petition in which he asserted a claim to the fund on deposit with the Clerk of the Court of Chancery (R. p. 3). The respondent herein, in answer to the order to show cause issued on said petition, appeared specially and challenged the jurisdiction of the Court of Bankruptcy to determine the rights of the respective parties in the fund which had already been adjudged to be the property of Jamaica Concrete Corporation, the complainant in the said chancery proceeding (R. p. 3).

On December 20th, 1941, seven months after the filing of the chancery decree, the Referee in Bankruptcy entered an order reciting among other things that the question of the ownership of the fund on deposit "and the propriety and validity of the said decree" is pending for deter-

mination by the Bankruptcy Court and restraining and enjoining the respondent herein and his counsel from taking any proceedings of whatsoever kind and character in the Court of Chancery in the aforementioned chancery proceeding (R. p. 7). The District Court reversed the Referee's order (Opinion R. p. 19; Order R. p. 22) and the Circuit Court of Appeals affirmed said reversal (R. p. 57).

On May 28th, 1941 a petition in reclamation was filed with the Referee in Bankruptcy signed by one, David H. Harris, as attorney for Jamaica Concrete Corporation, seeking an order compelling the bankruptcy receivers to turn over to Jamaica Concrete Corporation the property in their possession (R. p. 2).

On March 23rd, 1942 an order was entered by the Referee in Bankruptcy overruling the special appearance of the respondent, denying the application of David H. Harris for the amendment and dismissal of said reclamation petition, and directing the trustee "to make application to intervene in, and become a party to, the proceedings pending in the Court of Chancery of New Jersey, and to present such evidence as he may deem material and to take all proceedings in said cause as may be necessary or advisable for the protection and adjudication of the rights of the trustee" (R. p. 17). Insofar as the said order overruled the said special appearance and denied the amendment and dismissal of the said reclamation petition, the same was reversed by the District Court. Insofar as the said order directed the trustee to intervene in the Chancery proceedings the said order remains in full force and effect (R. p. 23). The said order of reversal was affirmed by the Circuit Court of Appeals (R. p. 57).

An order was entered in said chancery proceeding on petitioner's ex parte application on April 1st, 1942, granting leave to the petitioner to intervene and become a party to the said chancery proceeding. On April 10th, 1942, on petitioner's ex parte application an order was entered

in said chancery proceeding vacating the said order of April 1st, 1942 (R. p. 44).

The District Court, affirmed *per curiam* by the Circuit Court of Appeals, held that the Court of Chancery of New Jersey having acquired jurisdiction of the parties and actual possession of the property as security in a suit in rem to enforce a constructive trust more than ten months before the commencement of the bankruptcy proceeding, was not divested of its authority to adjudicate the controversy pending before it by the bankruptcy of the defendant (R. p. 19). The petitioner contends that the Referee in Bankruptcy as well as the District Court and the Circuit Court of Appeals, erred, and that the Bankruptcy Court had "exclusive, non-delegable jurisdiction" in the premises.

We will not set forth at length the facts with respect to the reclamation petition filed with the Referee in Bankruptcy allegedly on behalf of Jamaica Concrete Corporation, except to state that both Courts below have adjudged the fact to be that said petition was filed without the authority of Jamaica Concrete Corporation, and have ruled that the same should be dismissed; and it is well settled that this Court will not on *Certiorari* review such finding of fact.

Argument

The decisions of the Supreme Court of the United States, as well as those of the lower Federal courts are uniform in holding that the jurisdiction of a court over a suit *in rem* affecting specific property, where the court has acquired possession of the property involved more than four months prior to the bankruptcy of the defendant, is not superseded by such bankruptcy proceeding and that the Bankruptcy Court lacks the power to wrest possession of the property and jurisdiction of the suit from the court first assuming jurisdiction.

It is not open to question that the bill of complaint in the Court of Chancery claimed specific property by reason of a constructive trust which arose in February and in May of 1940 (R. p. 27). It is likewise an admitted fact that by virtue of the filing of the bill of complaint and *lis pendens* and the deposit of funds pursuant to the amended order of June 17th, 1940 (R. p. 37), the Court of Chancery acquired actual possession of the *res* in such manner as to render such decree as it might make binding upon all persons claiming an interest through the defendant (*N. J. R.S.* 2:26-28, R. p. 40). As we have observed, the bankruptcy of the defendant, River Edge Estates, Inc., occurred more than ten months after the bill of complaint and lis pendens had been filed and deposit made of the fund in question.

The reported decisions are unanimous in holding that where a court acquires jurisdiction over a *res* more than four months prior to the commencement of the bankruptcy proceeding, and even where a court acquires jurisdiction over a *res* within four months prior to the bankruptcy proceeding in a suit to enforce a lien antedating said four months period, the court having jurisdiction of the *res* has exclusive jurisdiction to determine rights therein; that

its jurisdiction is not superseded by the Bankruptcy Court; and that the Bankruptcy Court lacks the power to exercise any authority in respect to the *res* or to the prior proceeding (except, perhaps, to grant a temporary stay in order to afford the trustee an opportunity to enter an appearance in the prior proceeding); and in particular, lacks the power to restrain the other proceeding. In such cases, the occurrence of bankruptcy has no effect upon the pending proceeding. *This is the holding of all of the applicable decisions. There is no conflict of authority.*

Metcalf v. *Barker,* 187 U. S. 165 (1902);
Pickens v. *Roy,* 187 U. S. 177 (1902);
Straton v. *New,* 283 U. S. 318 (1931);
Bryan v. *Speakman,* 53 F. (2d) 463 c. d. 285 U. S. 839 (1931);
Penn General Casualty Co. v. *Pennsylvania,* 294 U. S. 189 (1934);
In re Hoey, Tilden & Co., 292 Fed. 269 (S. D. N. Y. 1922);
Frazier v. *Southern Loan & Trust Co.,* 99 Fed. 707 (C. C. A. 4, 1900);
Tennessee Producer Marble Co. v. *Grant,* 135 Fed. 322 (C. C. A. 3, 1905);
Bradley v. *United Wireless Telegraph Co.,* 79 N. J. Eq. 458; aff. 83 N. J. Eq. 688 (1911);
Rader v. *Star Mill & Elevator Co.,* 258 Fed. 599 (C. C. A. 8, 1919);
In re Pemberton, 260 Fed. 521 (D. C. Fla., 1919);
Brown Shoe Co. v. *Wynne,* 281 Fed. 807 (C. C. A. 5, 1922);
Gatell v. *Millian,* 2 F. (2d) 365 (C. C. A. 1, 1924);
In re Garner, 10 F. Supp. 380 (D. C. Pa., 1935);
McGonigle v. *Foutch,* 51 F. (2d) 455 (C. C. A. 8, 1931);
In re Morris W. Haft & Bros., Inc. v. *Wells,* 93 F. (2d) 991 (C. C. A. 10, 1937);

In re Cherokee Public Service Co., 20 F. Supp. 195 (D. C. Ark., 1937);
Union Joint Stock Land Bank v. *Byers*, 100 F. (2d) 82 (C. C. A. 3, 1938);
Dannell v. *Wilson-Weesner-Wilkinson Co.*, 109 F. (2d) 364 (C. C. A. 6, 1940).

In the case *sub judice*, the Court of Chancery acquired *actual possession* of the *res* more than ten months prior to the commencement of the bankruptcy proceeding. The suit was one to enforce a lien which arose over a year prior to the commencement of the bankruptcy proceeding. Under these circumstances, the District Court, in giving effect to the applicable decisions of this Court and of lower Federal Courts, could not have ruled otherwise than it did—that the jurisdiction of the Court of Chancery was neither impaired nor destroyed by the initiation of the bankruptcy proceeding. So squarely in conformity with the well established rule of decision on the facts involved herein was the decision of the District Court, that the learned Circuit Court of Appeals affirmed *per curiam* on its opinion, and within a few days of the argument of the appeal.

The petitioner apparently contends that the decision below is in conflict with the following decisions by this Court:

Taylor v. *Sternberg*, 293 U. S. 470 (1935);
Pepper v. *Litton*, 308 U. S. 295 (1939);
Thompson v. *Magnolia Petroleum Co.*, 309 U. S. 478 (1939);
Whitney v. *Wenman*, 198 U. S. 539 (1905).

An examination of the cited cases discloses each of them to involve a factual situation completely distinguishable from that in the case *sub judice*, and, for very obvious reasons, requiring the application of a distinct line of precedents.

Taylor v. *Sternberg, supra,* involved state court proceedings had pursuant to state insolvency statutes, and of course, it was held that the bankruptcy proceeding superseded the state insolvency proceeding. The Court of Chancery proceeding in the case *sub judice* was not in any wise an insolvency proceeding; nor does the appellant contend that it was such a proceeding.

Pepper v. *Litton, supra,* in the language of the Supreme Court, presented

> "the question of the power of the Bankruptcy Court to disallow, either as a secured or as a general or unsecured claim, a judgment obtained by the dominant or controlling stockholder of the bankrupt corporation on alleged salary claims".

This case does not involve that question at all. The default judgment recovered by the dominant stockholder dealt with in *Pepper* v. *Litton* was obtained by fraud and collusion. The decree of the Court of Chancery in the case *sub judice* was not obtained by confession or default, but, on the contrary, after contested litigation and a final hearing on the merits; nor was there, nor could there be, the faintest suggestion of fraud in the procurement of said decree.

Thompson v. *Magnolia Petroleum Co., supra,* affirmed the jurisdiction of the Bankruptcy Court upon the finding of fact that the trustee was in "actual possession of the property". In the case *sub judice,* the situation was precisely the reverse, the property being in the actual possession of the Court of Chancery (as security for the claim of the complainant in the proceeding pending therein). Yet, even in *Thompson* v. *Magnolia Petroleum Co.,* this Court concluded that it was desirable to have the litigation proceed in the State Courts of Illinois.

Whitney v. *Wenman, supra*, did not involve a conflict of jurisdiction. It was there found as a fact that a lease made by the bankrupt of premises in which certain of its property was located was collusive and that, therefore, the property was in the constructive possession of the bankrupt.

It is clear that the fund in question, having been deposited with the Clerk in Chancery more than ten months before the commencement of the bankruptcy proceeding, in substitution of the *lis pendens* and as security for the satisfaction of the claim of complainant, did not remain in the constructive possession of the bankrupt. The petitioner's contention to the contrary is without basis. Equally without justification is the petitioner's assertion that the complainant had no lien upon the moneys deposited for the express purpose of securing payment of the complainant's claim (R. p. 37).

We respectfully submit that there is no conflict of decision to be resolved herein, and that the applicable decisions uniformly support the determination of the District Court and the Circuit Court of Appeals below. The matter is one turning upon the facts of the particular case and raises no questions of public interest. There is, in the language of Chief Justice Hughes "an utter absence of any good reason for asking" for a *Writ of Certiorari*. The petition, therefore, should be denied, with costs.

Respectfully submitted,

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